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No. 03-724

Supreme Court, U.S.
FILED
FEB 3 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., *et al.*,
Petitioners,

v.

EMPAGRAN, S.A., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether respondents, five foreign companies that purchased goods outside the United States from other foreign companies, may pursue Sherman Act claims seeking recovery for overcharges paid in transactions occurring entirely outside U.S. commerce.

PARTIES TO THE PROCEEDINGS BELOW

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioners: F. Hoffmann-La Roche Ltd, Hoffmann-La Roche Inc., Roche Vitamins Inc., BASF AG, BASF Corporation, Rhône-Poulenc Animal Nutrition Inc., Rhône-Poulenc Inc., Hoechst Marion Roussel S.A., Rhône-Poulenc S.A., Takeda Chemical Industries, Ltd., Takeda Vitamin & Food USA, Inc., Daiichi Pharmaceutical Co., Ltd., Daiichi Pharmaceutical Corp., Daiichi Fine Chemicals, Inc., Eisai Co., Ltd., Eisai U.S.A., Inc., Eisai Inc., Akzo Nobel Chemicals B.V., Akzo Nobel Inc., Bioproducts Incorporated, Chinook Group Ltd., Cope Investments Ltd., Degussa AG, Degussa Corp., DuCoa, L.P., DCV, Inc., EM Industries, Inc., Merck KGaA, E. Merck, Lonza Inc., Lonza AG, Alusuisse-Lonza Group Ltd, Mitsui & Co., Ltd., Nepera, Inc., Reilly Chemicals, S.A., Reilly Industries, Inc., Sumitomo Chemical Co., Ltd., Sumitomo Chemical America, Inc., Tanabe U.S.A. Inc. and UCB Chemicals Corp.

Respondents: Empagran, S.A., Nutricion Animal, S.A., Winddridge Pig Farm, Brisbane Export Corp. Pty, Ltd. and Concern Stirol, on behalf of themselves and all others similarly situated.

RULE 29.6 STATEMENT

Petitioners have provided the statement required by Rule 29.6 of this Court in the petition for writ of certiorari. That statement is currently accurate, except that it includes information regarding EM Industries, Inc., Merck KGaA and E. Merck, which had joined in the petition but have not joined in this brief.

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BRIEF FOR PETITIONERS

Petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit, which reversed the district court's dismissal of respondents' claims.

OPINIONS BELOW

The opinion of the court of appeals is reported at 315 F.3d 338. Pet. App. 1a-42a. The orders of the court of appeals denying petitioners' petition for rehearing and petition for rehearing en banc are unreported. Pet. App. 43a, 44a. The opinion of the district court is unreported. Pet. App. 45a-62a.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2003. Petitioners' timely petitions for rehearing and for rehearing en banc were denied on September 11, 2003. Pet. App. 43a-44a. The petition for a writ of certiorari was filed on November 13, 2003, and was granted on December 15, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes relevant to this proceeding, Sections 1 and 7 of the Sherman Act, 15 U.S.C. §§ 1, 6a, and Section 4 of the Clayton Act, 15 U.S.C. § 15, are reprinted in the appendix to this brief.

STATEMENT

The court of appeals incorrectly held that respondents—five foreign companies that purchased vitamins outside the United States from other foreign companies—can assert price-fixing claims under U.S. antitrust law even though they sustained their injuries in purely foreign commercial transactions. The court reached this erroneous conclusion by misconstruing the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a, to achieve a result contrary to that statute's plain text and manifest purpose. Congress passed this law to *restrict* the extraterritorial application of the Sherman Act and preclude cases, such as this one, where the plaintiff's claim arises from an injury sustained in transactions conducted entirely within or between countries other than the United States. Injuries sustained in such "purely foreign" transactions fall outside the scope of U.S. antitrust regulation, whether the participants are foreign companies (as here) or U.S. companies operating abroad.

The FTAIA prohibits the application of the Sherman Act to conduct "involving foreign trade or commerce" unless two conditions are satisfied: first, the conduct must have "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce; and second, "such effect" on U.S. commerce must "give[] rise to a claim" under the Sherman Act. § 6a. The court of appeals misread this restrictive statute as *expanding* U.S. antitrust jurisdiction to regulate transactions that occur entirely outside U.S. commerce. The court interpreted the FTAIA as authorizing a Sherman Act claim whenever conduct that affected such foreign transactions *also* affected U.S. commerce and those U.S. effects "give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." Pet. App. 4a. Based on this incorrect reading of the FTAIA, the court of appeals reversed the district court's dismissal of respondents' claims for lack of subject matter jurisdiction and, further, held that respondents have standing under Section 4 of the Clayton Act to seek damages for their purely foreign injuries.

The court of appeals' ruling turns a restrictive amendment to the Sherman Act on its head. It transforms the FTAIA, which was intended to limit the Sherman Act's extraterritorial scope, into an assertion of regulatory authority over transactions taking place entirely in foreign countries. The court of appeals' decision is contrary to the natural reading of the FTAIA endorsed by the Department of Justice and conflicts with longstanding principles governing the construction of federal legislation. The FTAIA, properly construed, confines application of U.S. antitrust law to suits complaining of the effects of anticompetitive conduct on U.S. commerce. Moreover, the private right of action invoked by respondents under Section 4 of the Clayton Act provides no remedy for injuries sustained in purely foreign commercial transactions.

1. Numerous civil and criminal proceedings have been instituted both in the United States and abroad challenging

alleged cartel activity in the vitamins industry. More than seventy-five federal civil antitrust cases, including class actions, were filed beginning in 1998 and consolidated for pretrial proceedings in the district court. Virtually all the claims in those cases have now settled for amounts exceeding $2 billion. In addition to the federal actions, over twenty actions have been filed by state attorneys general and over one hundred lawsuits have been brought by indirect purchasers under various state laws.

Beginning in 1999, before any significant proceedings in the civil cases, several petitioners pleaded guilty to federal criminal antitrust violations for fixing prices of vitamins sold in the United States. Criminal fines totaling $900 million were imposed on these entities collectively. See Pet. App. 68a. Several senior executives, including foreign nationals, also pleaded guilty to felony price-fixing charges and served prison terms. Outside the United States, record civil penalties exceeding $1 billion were assessed against some petitioners by the European Union, Canada, Australia and Korea. Pet. App. 68a. Private civil suits for damages have also been filed in Canada, the United Kingdom, Germany, Belgium and the Netherlands, and class actions have been filed in Canada, Australia and New Zealand.

Respondents are five foreign companies located in Australia, Ecuador, Panama and Ukraine. They initiated this action in July 2000, alleging that petitioners had conspired to fix prices and allocate markets for vitamins on a global basis in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. They purport to represent a class of all foreign entities that purchased vitamins for delivery in foreign countries, and they seek treble damages and injunctive relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, for injuries allegedly sustained as a result of those purchases. Am. Comp. ¶¶ 7, 111, J.A. 16, 63. Respondents have not asserted that

they purchased vitamins in the United States or in transactions in U.S. commerce.

2. The district court dismissed respondents' federal antitrust claims for lack of subject matter jurisdiction. The court considered the "critical question" to be "whether allegations of a global price fixing conspiracy that affects commerce both in the United States and in other countries give[] persons injured abroad in transactions otherwise unconnected with the United States a remedy under our antitrust laws." Pet. App. 48a. The district court concluded that they did not, relying on the limited extraterritorial reach of the U.S. antitrust laws generally and, in particular, the FTAIA. *Id.* at 48a-52a. The district court construed subsection (2) of the FTAIA, 15 U.S.C. § 6a(2), to require that "the injuries [plaintiffs] seek to remedy 'arise' from an anticompetitive effect of defendants' conduct on U.S. commerce." *Id.* at 49a. Dismissal was necessary, the court reasoned, because respondents had not alleged that the "injuries for which they seek redress"—*i.e.*, their alleged injuries from purchasing vitamins in foreign countries—"have the requisite domestic effects necessary to provide subject matter jurisdiction." *Id.*

The district court noted that its ruling was supported by existing case law, including the Fifth Circuit's decision in *Den Norske Stats Oljeselskap AS v. HeereMac v.o.f.*, 241 F.3d 420 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002), which was then the only decision by a court of appeals addressing the question. Pet. App. 50a-51a. The district court did not reach petitioners' alternative argument that respondents lacked standing to assert their claims under Section 4 of the Clayton Act, 15 U.S.C. § 15. Pet. App. 62a.[1]

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[1] The district court also dismissed respondents' claims for purported violations of "customary international law" under the Alien Tort Claims Act, 28 U.S.C. § 1350. Pet. App. 61a-62a. In addition, it declined to assert

3. The court of appeals reversed, interpreting subsection (2) of the FTAIA to authorize application of the Sherman Act to complaints of injuries sustained in purely foreign transactions. Rejecting the Fifth Circuit's contrary ruling in *HeereMac*, the D.C. Circuit construed the FTAIA's requirement that a U.S. effect give rise to "a claim" to mean that whenever "*someone*, even if not the foreign plaintiff who is before the court," has a claim arising from an effect of the defendant's conduct on U.S. commerce, anyone with a claim arising from a purely foreign effect of that conduct can sue as well. *Id.* at 4a, 19a–20a (emphasis added).

The D.C. Circuit did not rest its conclusion on the text of the FTAIA, which it believed has "no 'plain meaning.'" *Id.* at 4a. Instead, the court of appeals relied on selected statements in the House Judiciary Committee Report on the FTAIA that it deemed "consistent" with its holding and more significant than other statements in the House Report supporting the Fifth Circuit's construction of the statute. *Id.* at 24a-30a. Most important for the court, however, was its determination that, as a matter of policy, "suits by foreign purchasers harmed solely by a conspiracy's foreign effects are necessary to protect U.S. commerce from global conspiracies." *Id.* at 32a. The court did not consider the numerous deterrents otherwise existing under U.S. and foreign law, instead citing generalized "underlying policies of deterrence" that it found "emanating" from this Court's decision in *Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978). Pet. App. 4a, 32a-33a. The court also held that respondents have standing to assert a claim for damages under the Clayton Act. *Id.* at 33a-37a.

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supplemental jurisdiction over respondents' remaining claims based on unspecified "competition laws of the relevant foreign nations." *Id.* at 58a, 60a.

Judge Henderson dissented. She explained that "the plain language" of subsection (2) of the FTAIA "expressly limits jurisdiction to a claim which itself arises from the domestic antitrust effect required under" subsection (1). *Id.* at 42a. She added that the Fifth Circuit's construction of subsection (2)—requiring that the plaintiff's own injuries "arise from" an effect on U.S. commerce—reflects the "more natural" reading of the provision and is "unambiguously supported" by the legislative history. *Id.* at 40a.

4. On petition for rehearing en banc, the court of appeals invited the Solicitor General to submit a brief expressing the views of the United States. In response, the Solicitor General urged en banc review to reverse the decision below.[2] The Solicitor General disagreed with the panel's ruling, explaining that the "most natural reading" of the FTAIA "is that the requisite anticompetitive effects on domestic commerce must give rise to the claim brought by the *particular plaintiff* before the court." *Id.* at 74a (emphasis in original). The Solicitor General also criticized the opinion's deterrence rationale. "[C]onsiderations based on deterrence," the Solicitor General explained, "counsel *against* the panel's expansive interpretation of the FTAIA," because increasing the potential liability of antitrust offenders worldwide will discourage them from voluntarily disclosing misconduct to the Department of Justice under its corporate leniency program. *Id.* at 78a (emphasis in original).

Notwithstanding the position of the United States, the D.C. Circuit denied rehearing en banc by a 4 to 3 vote, with Judges Sentelle, Henderson and Randolph voting to grant rehearing and Judges Garland and Roberts not participating.

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[2] Brief of the United States and the Federal Trade Commission as Amici Curiae in Support of Petition for Rehearing En Banc, *Empagran, S.A., et al., v. F. Hoffmann-La Roche, Ltd, et al.*, 315 F.3d 338 (D.C. Cir. 2003) (No. 01-7115). Pet. App. 63a-81a.

SUMMARY OF ARGUMENT

The antitrust laws of the United States do not permit respondents—foreign companies that purchased vitamins from foreign sellers for use in foreign countries—to seek damages for overcharges they paid in their home countries. It makes no difference that similar overcharges were allegedly paid by others in the United States or that the overcharges here and abroad both resulted from an alleged "global conspiracy." The U.S. antitrust laws may be applied extraterritorially only if conduct outside the United States had a direct and substantial effect on U.S. commerce, and then only to redress injury resulting from that U.S. effect.

The federal antitrust laws were designed to protect American markets and American consumers and have no application to foreign transactions that do not affect U.S. commerce. This Court and the lower federal courts have consistently recognized that it is concern over the direct U.S. consequences of anticompetitive conduct that justifies the extraterritorial application of federal law. The recent decisions by the D.C. Circuit in this case and by the Second Circuit in *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002), *petition for cert. dismissed*, 71 U.S.L.W. 3169 (Aug. 8, 2003) (No. 02-340), both of which approved the application of U.S. antitrust law in cases complaining of purely foreign injuries, mark a radical departure unsupported by any precedent of this or any other court. These decisions open the federal courts to large numbers of complex antitrust disputes of no interest to the United States—suits by plaintiffs claiming injury from purely foreign transactions governed by the competition laws of the countries where they occurred. Permitting such claims would cause an enormous drain on the judicial resources of the United States.

The U.S. antitrust laws were not applied to purely foreign transactions such as respondents' vitamin purchases before the FTAIA was enacted, and the FTAIA—a jurisdiction

limiting statute—did not enlarge the extraterritorial scope of U.S. antitrust law. The statute's text confines U.S. antitrust jurisdiction to cases complaining of the U.S. effects of anticompetitive conduct. It provides, in a series of restrictive clauses, that U.S. antitrust law "shall not apply" extraterritorially *unless* the conduct complained of had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce *and* "such effect gives rise to a claim." As the Solicitor General has explained, this language limits antitrust claims to those complaining of injury arising from a U.S. effect.

The contrary reading by the court of appeals—that the FTAIA permits a plaintiff alleging injury from the foreign effects of anticompetitive conduct to sue under federal law whenever *someone else* has a claim arising from the U.S. effects of that conduct—not only conflicts with the statute's text but also flouts the rule that federal law should be construed to avoid infringing the prerogatives of foreign sovereigns. Foreign nations have a strong interest in applying their own domestic competition policies, including their own decisions about appropriate remedies, to transactions occurring in their own countries. It is inconceivable that Congress would have opened U.S. courts to plaintiffs from all over the world, or authorized an unprecedented species of claim requiring a preliminary showing that *someone else* was injured by effects of the same conduct on commerce in a *different* country (*i.e.*, the United States), without clearly stating its intent to do so. Serious doubt as to whether Congress even has the power to regulate purely foreign transactions provides further ground for rejecting such an interpretation.

As of the time Congress enacted the FTAIA, no case had ever authorized claims arising from foreign transactions occurring wholly outside U.S. commerce, and virtually all academic commentary urged that the focus of U.S. antitrust

law be restricted to claims arising from effects of anticompetitive conduct on U.S. commerce. Nothing in the legislative history suggests that Congress intended to depart from that consensus. Instead, it confirms that Congress passed the FTAIA to limit, not enlarge, the extraterritorial reach of federal antitrust law.

The court of appeals' policy judgment that permitting claims by foreign plaintiffs is "necessary to protect U.S. commerce from global conspiracies" is unfounded and opposed by the Solicitor General, who has warned that the ruling below will hinder, not advance, deterrence. Nor is it supported, as the D.C. Circuit claimed, by this Court's opinion in *Pfizer*, 434 U.S. 308, which decided a very different question and had no occasion to consider whether purely foreign injuries could give rise to a U.S. antitrust claim. The supposedly "global" nature of the alleged conspiracy does nothing to bring respondents' claims within the ambit of the FTAIA. It cannot alter the fact that the injuries they complain of—overpayments for vitamins purchased from other foreign companies outside the United States—resulted from supracompetitive pricing in their home countries, not from any effect on the United States.

Finally, respondents' claims to recover damages for purely foreign injuries are not actionable under Section 4 of the Clayton Act. That provision permits recovery only for injuries sustained "by reason of" an impairment of *U.S. commerce* that the federal antitrust 'aws are designed to prevent. As this Court frequently has recognized, Section 4 does not confer a right to relief for all consequences that can somehow be linked to illegal conduct. It provides a remedy only for those consequences that the antitrust laws were designed to prevent—*i.e.*, harms to U.S. commerce. Respondents' purely foreign injuries do not result from any such harm, and respondents therefore lack standing to pursue their claims.

ARGUMENT

I. RESPONDENTS' CLAIMS FALL OUTSIDE THE EXTRATERRITORIAL SCOPE OF THE SHERMAN ACT BECAUSE THEY ARISE FROM INJURIES SUSTAINED IN PURELY FOREIGN COMMERCE.

A. Extraterritorial Application of the Sherman Act Has Always Been Justified by Concern for Effects of Anticompetitive Conduct on U.S., Not Foreign, Commerce.

"American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). On its face, the Sherman Act is concerned with the competitive conditions of U.S. commerce, including import and export commerce between the United States and foreign nations. Section 1 forbids any "conspiracy * * * in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. Section 2 similarly prohibits any attempt or conspiracy to "monopolize any part of the trade or commerce among the several States, or with foreign nations." § 2. Nothing in the Sherman Act suggests any purpose to regulate, or any concern over the consequences of anticompetitive conduct on, transactions occurring entirely *within* or *between* foreign countries. See 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 273a (2d ed. 2000) ("Congress did not intend American antitrust law to rule the entire commercial world"). This Court's precedents reflect an exclusive concern with the effects of anticompetitive conduct on U.S. commerce. In every case where this Court has applied U.S. antitrust laws to foreign activity, the gravamen of the plaintiff's claim was an injury sustained from harm to competition in U.S. commerce.

When first presented with the question in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), this Court held that the Sherman Act was inapplicable to conduct occurring outside the territory of the United States. *Id.* at 357. That strict territorial limitation has since been modified, but only to the extent that activities occurring outside the United States have inflicted anticompetitive effects on competition or consumers in U.S. commerce. See, *e.g.*, *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917) (approving application of Sherman Act to agreements regarding shipping between United States and foreign country that "affected the foreign commerce *of this country*") (emphasis added); *United States v. Sisal Corp.*, 274 U.S. 268, 276 (1927) (approving application of Sherman Act to agreements to restrain competition on U.S. imports and domestic market for foreign goods that "brought about forbidden results *within the United States*") (emphasis added).

The modern rationale for extraterritorial application of the Sherman Act was stated by the Second Circuit, sitting as the court of last resort in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (L. Hand, J.) ("*Alcoa*"). A foreign cartel had restricted the import of aluminum ingot into the United States. In determining whether the Sherman Act reached the defendants' extraterritorial conduct, Judge Hand explained that principles of international law presumptively limit the extraterritorial reach of federal legislation:

> "[W]e are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.' We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. On the other hand, it is settled law * * * that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize." 148 F.2d at 443 (citations omitted).

Judge Hand therefore construed the Sherman Act to regulate foreign conduct that both was intended to affect U.S. commerce and in fact did so. *Id.* at 443-44.

This Court has repeatedly endorsed *Alcoa*'s rationale that the U.S. effects of foreign activities are the justification for applying U.S. antitrust law to those activities. Most recently, in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), the Court explained that the Sherman Act was appropriately applied to international conspiracies that were directed at, and had a "substantial effect" on, the market for insurance in the United States. *Id.* at 796. See also, *e.g.*, *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 113 n.8 (1969) (restraint on "exports from the United States" justified liability under U.S. law); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) (same). In none of these cases was the effect on U.S. commerce simply a pretext for remedying some *other* harm allegedly sustained by the plaintiff outside U.S. commerce. Rather, in each case the injury for which redress was sought was a harm that arose from an effect of the defendants' conduct on commerce within the United States or between the United States and a foreign country.

Lower court decisions also respect these limits on the extraterritorial scope of the antitrust laws. As the Solicitor General has observed, as of 1982, when the FTAIA was enacted, no court had ever held that a plaintiff could pursue a federal antitrust claim based on injuries sustained entirely outside U.S. commerce. Pet. App. 80a. Indeed, respondents conceded in the district court that, as of the time of argument, no court ever had interpreted the federal antitrust laws to reach wholly foreign transactions such as those at issue in this case. Pet. App. 52a. The absence of precedent supporting respondents' reading reflects the U.S. antitrust laws' histori-

cally exclusive concern with the conditions of U.S. commerce—an exclusive focus that, as explained below, the FTAIA was designed to reinforce.

B. The FTAIA Expressly Precludes Extraterritorial Application of the Sherman Act to Claims that, Like Respondents', Do Not Arise from an Anticompetitive Effect on U.S. Commerce.

Nothing in the FTAIA suggests a purpose to enlarge the extraterritorial reach of the federal antitrust laws by authorizing claims based on purely foreign injuries. The statute states that, for the Sherman Act to apply to foreign conduct, that conduct must have a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, and that U.S. effect must "give[] rise to a claim." Properly construed, this language requires that the claim of the plaintiff invoking the authority of the court arise from the effect on U.S. commerce. 1A AREEDA ET AL., ANTITRUST LAW ¶ 272h2 ("[A] foreign consumer whose only injury is felt entirely in his foreign country cannot [sue]"). The text and context of the statute, as well as longstanding principles governing the construction of federal law, leave no room for the court of appeals' contrary interpretation that the statute permits any plaintiff injured by the foreign effects of anti-competitive conduct to sue if that conduct also produced a U.S. effect that "give[s] rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court." Pet. App. 4a.

1. *The FTAIA expressly limits extraterritorial application of the Sherman Act to claims that "arise" from an anticompetitive effect on U.S. commerce.*

a. ***Express language.*** The plain language of the FTAIA restricts the extraterritorial scope of the Sherman Act. The statute begins with the general prohibition that the Sherman

Act "shall not apply" to conduct involving foreign commerce "unless" two fundamental conditions are satisfied. 15 U.S.C. § 6a. Its negative terminology does not affirmatively authorize claims of any kind. Each statutory condition ties extraterritorial application of the Sherman Act to the U.S. effects of the challenged conduct. The first condition requires that the conduct have a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. § 6a(1). This provision makes clear that the Sherman Act does not reach foreign activity that results in only indirect, insubstantial or unforeseeable effects on U.S. commerce.

The second condition requires that "such effect gives rise to a claim" under the Sherman Act. § 6a(2). The indefinite article "a" refers generically to "a claim" of the plaintiff—*i.e.*, *any* claim that the plaintiff may have "under the provisions of sections 1 to 7" of the Sherman Act. *Id.* As the Solicitor General has stated, "the most natural reading" of this second condition "is that the requisite anticompetitive effects on domestic commerce must give rise to the claim brought by the *particular plaintiff* before the court." Pet. App. 74a (emphasis in original). See also *HeereMac*, 241 F.3d at 428 ("plain language" of FTAIA precludes claims for overseas injury that "arises from effects in a non-domestic market"). Subsection (2) requires that a U.S. effect give rise to the *particular* claim asserted by the plaintiff in the case before the court—not the abstract claim of some unidentified person purchasing products in another nation.

It is fundamental that litigants can assert only their *own* claims. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (plaintiff "cannot rest his claim to relief on the legal rights or interests of third parties"); see also *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982). A litigant's claim has never been conditioned on a showing that another potential litigant has a similar claim. Given this legal tradition, it is highly implausi-

ble that Congress intended to embrace the novel notion that a plaintiff may assert an otherwise non-cognizable claim if he can demonstrate that some *other* person has "a claim" that arises from some *other* effect—*i.e.*, a U.S. effect different from the foreign effect that gave rise to the plaintiff's own claim.

The use of the article "a" in subsection (2) hardly suggests that Congress intended the dramatic broadening of the antitrust laws that respondents advocate. See *Gustafson v. Alloyd Inc.*, 513 U.S. 561, 575 (1995) (refusing to "ascrib[e] to one word a meaning so broad that it * * * giv[es] 'unintended breadth'" to a statute) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). This Court has refused to rely myopically on the use of "[t]he article 'a'" when interpreting the scope of a statute. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 500 (1998). Here, read in context, the statutory language refutes respondents' sweeping construction. The only reasonable reading is that it requires a plaintiff to have suffered an injury as a result of anticompetitive effects in U.S. commerce. This reading comports with the longstanding principle of antitrust standing (discussed below, *infra*, pp. 42-46) that a plaintiff must *himself* have suffered an injury that the antitrust laws were designed to prevent—a principle that, as the Solicitor General has explained, was "incorporated" into the FTAIA through the requirement that *the plaintiff's* claim must "arise from" the requisite anticompetitive effect on U.S. commerce. Pet. App. 75a.

b. ***Statutory structure.*** The statute's structure supports this interpretation. The proximity of the first condition (that the conduct complained of must cause a U.S. effect) to the immediately following condition (that such U.S. effect must "give[] rise to a claim") demonstrates an intention by Congress that *all* Sherman Act claims *must* arise from a U.S. effect. See *Holloway v. United States*, 526 U.S. 1, 6 (1999)

(courts must consider "placement" of statutory phrase); see also *Jarecki*, 367 U.S. at 307 (surrounding language indicated that statutory provision was intended to have "a precise and narrow application").

The two conditions imposed by subsections (1) and (2) are also followed by a concluding proviso that imposes yet another restriction tied strictly to U.S. effects. It provides that, when jurisdiction exists under subsection (1) as a result of an effect on export commerce of "a person engaged in such trade or commerce in the United States," the Sherman Act shall apply "*only* for injury to export business *in the United States*." § 6a (emphasis added). This provision makes clear that, even where there are effects on export commerce from the United States, the Sherman Act will apply *only* with respect to injuries to the domestic exporter, not injuries to a foreign purchaser of the exported goods.

Finally, Congress's use of the same phraseology in contemporaneous amendments to the Federal Trade Commission Act ("FTCA") belies the notion that the "a claim" language in the FTAIA was intended to authorize a plaintiff to assert a claim arising from a foreign effect whenever some other person has "a claim" arising from a U.S. effect. Those amendments provide that the FTCA's prohibition on unfair methods of competition "shall not apply" unless those methods have a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce and "such effect gives rise to a claim under [the FTCA]." 15 U.S.C. § 45(a)(3). Only the Federal Trade Commission may assert a claim under the FTCA; there is no private right of action. Accordingly, in § 45(a)(3), the language "a claim" necessarily refers to *the claim* of the Federal Trade Commission itself, because the Federal Trade Commission is the *only* potential plaintiff under the FTCA. Similarly, in the FTAIA, the "a claim" language refers to the claim of the plaintiff before the court, not some other potential plaintiff.

In short, the limiting language employed by Congress in the FTAIA repeatedly returns to U.S. domestic effects as the essential concern of the antitrust laws. These limitations cannot plausibly be read—as the court of appeals read them—to *expand* the Sherman Act's jurisdictional reach to permit claims that arise from the foreign effects of anticompetitive conduct on foreign commerce. As the Solicitor General has explained, "[the FTAIA's] text contains no hint of a statutory purpose to permit recovery where the situs of injury is entirely foreign and the injury exclusively arises from a conspiracy's effect on foreign commerce." Pet. App. 75a.

c. ***Sensible construction.*** Respondents nowhere come to grips with the governing statutory language and structure of the FTAIA, and they offer no sensible explanation for their proffered interpretation. Their reading of the "a claim" language of subsection (2) is, in fact, contradicted by the only contemporaneous explanation given for its inclusion. The bill initially reported by the House Judiciary Committee required that an effect on domestic commerce be "the basis of the violation alleged" under this Act. H.R. Rep. No. 97-686, at 18 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2500. Chairman Rodino explained that this language was changed to state that the effect must "give[] rise to a claim" only as a "minor clarification," because technically an "effect" does not give rise to a "violation" but rather to "a claim," and he emphasized that the "substitute language accomplishes the same effect as the [original] committee version * * *." *Id.* at 18. This explanation refutes any argument that Congress used the indefinite article "a" before "claim" in order to enlarge the extraterritorial scope of the Sherman Act.

Respondents nonetheless complain that the reading of subsection (2) endorsed by the Solicitor General and the Fifth Circuit would subject the same "unitary" conduct to U.S. antitrust regulation in some cases and not in others, depending on whether the plaintiff's claim arose from an injury to

U.S. commerce or an injury to foreign commerce. Br. in Opp. 20. But that result is entirely consistent with the goals of the FTAIA. As the Solicitor General has explained, "[t]he FTAIA's focus is on *domestic effects* of anticompetitive conduct." Pet. App. 75a (emphasis added). Respondents' suggestion that conduct actionable in one case must be actionable in all cases—regardless of its territorial impact—is belied by the FTAIA's proviso, which states that, in the case of conduct affecting U.S. export commerce, the Sherman Act "shall apply to such conduct *only* for injury to export business in the United States." § 6a (emphasis added). Congress would not have disallowed recovery for certain injuries sustained in U.S. export commerce while simultaneously authorizing recovery for other foreign injuries lacking any connection at all to U.S. commerce.

Nor is respondents' reading necessary to avoid rendering the statute's proviso redundant. Opp. to Pet. 21. Even the court of appeals declined to accept that argument (Pet. App. 18a), and for good reason. Together, subsections (1)(B) and (2) permit a Sherman Act claim that arises from the requisite effect on U.S. export commerce "of a person engaged in such trade or commerce in the United States." The proviso adds an additional restriction. It limits such claims to ones based on "injury to export business in the United States" (emphasis added). Subsections (1)(B) and (2) thus require that an injury arise from an effect on a U.S. exporter, such as injury arising from the exclusion of an exporter from U.S. export commerce (possibly including injury to foreign purchasers of U.S. goods). The proviso, however, provides that such injuries are actionable only if inflicted on U.S. "export business in the United States" (and thus would preclude suits by foreign purchasers of U.S. exports). There is no redundancy. See *HeereMac*, 241 F.3d at 426 n.19 (rejecting redundancy argument).

It is respondents' construction that would deprive subsection (2) of any real operative effect. Subsection (1) codifies the basic "effects" test applied by U.S. courts since *Alcoa*, making clear that only a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce warrants the extraterritorial assertion of U.S. antitrust jurisdiction. Such an effect would, virtually by definition, give rise to "a claim" by *someone* in the United States. The additional requirement of subsection (2) would have no operative significance if, as respondents assert, it requires only that the effect on U.S. commerce is actionable by *someone*. Subsection (2), properly construed, performs the meaningful function of limiting the jurisdiction of the Sherman Act to claims that "arise from" the U.S. effects described in subsection (1). See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) ("every word" in statute should be given "some operative effect"); see also *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Finally, respondents argue that petitioners' reading of the FTAIA would deny recovery to U.S. companies for injuries they sustain outside U.S. commerce and would likewise "immunize" U.S. companies from liability for misconduct abroad. Br. in Opp. 24 n.14. But that result is precisely the one sought by Congress in passing the FTAIA. Congress intended U.S. companies operating abroad to have the same remedies, and to be subject to the same rules, as their foreign counterparts. See, *infra*, pp. 32-33. The FTAIA makes clear that the Sherman Act does not address injuries arising from purely foreign transactions, including those involving U.S. sellers or buyers, that produce no injurious effects on U.S. commerce.

2. *Established principles governing the construction of federal statutes preclude the court of appeals' expansive reading of the FTAIA.*

a. ***Avoidance of international discord.*** The court of appeals' construction of the FTAIA conflicts with this Court's longstanding rule that federal legislation should be construed to avoid unreasonable interference with other nations' sovereign authority "if any other possible construction remains." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963). In *Alcoa*, Judge Hand relied on that rule in concluding that the Sherman Act would not reach agreements limiting the supply of goods in foreign nations given "the international complications likely to arise from an effort in this country to treat [them] as unlawful." 148 F.2d at 443. The FTAIA's reference to "a claim" provides no "clearly expressed" intention (*McCulloch*, 372 U.S. at 22) to expand U.S. antitrust jurisdiction to claims that would undoubtedly cause international discord. See also *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (requiring clear expression of congressional intent before giving law broad extraterritorial effect); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (same); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ("RESTATEMENT (THIRD)") §§ 402, 403, 415 & Reporter's Note 3 (1987).

In *Hartford Fire*, this Court cited *Alcoa* and the RESTATEMENT (THIRD) in concluding that the Sherman Act applied to foreign conduct that was intended to, and did, cause substantial effects on the U.S. insurance market. 509 U.S. at 796. The Court explained that, because the defendants did not contest Sherman Act jurisdiction (*id.* at 795), and because in any event the plaintiffs' alleged injuries from harms to the U.S. economy fell well within the statute's established bounds (*id.* at 796), the only question was

whether a "true conflict" existed between U.S. and foreign law that made compliance with both impossible (*id.* at 798-99). Here, by contrast, the question is whether the Sherman Act permits suits by persons complaining of injuries sustained in transactions that were neither a part of (nor had any effect on) U.S. commerce.

Application of federal law to such transactions is presumptively unreasonable and contrary to Congress's intentions because the traditional "effects" justification for extraterritorial application of the Sherman Act is absent. See RESTATEMENT (THIRD) § 403(1) (nations are presumed not to legislate "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable"). It would be highly unreasonable to interpret federal law to govern activities that take place outside the United States, have little or no connection to the United States and are primarily of interest to other nations. *Id.*

Applying these principles, this Court has refused to construe federal law to apply to foreign activities where doing so would create "the possibility of international discord." *McCulloch*, 372 U.S. at 21-22. See also *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 382-83 (1958) (relying on "the interacting interests of the United States and of foreign countries" to reject application of Jones Act to suits by foreign seamen on foreign vessels); *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953) (looking to "prevalent doctrines of international law" in determining that Jones Act did not apply to foreign seamen on foreign vessels); RESTATEMENT (THIRD) § 403(2)(h). The Court did not view compliance with both sovereigns' laws as impossible in any of these cases. Rather, differences in sovereign policies regarding available remedies prompted the Court to construe the federal statutes as inapplicable.

Those same considerations are controlling here. Construing the FTAIA to regulate transactions in foreign countries that do not affect the United States would undoubtedly lead to conflict and resentment. Foreign competition laws differ significantly from U.S. law, both in substance and procedure. Although price-fixing is widely proscribed, other commercial activities that may be prohibited under U.S. law may be permissible under foreign law. Similarly, the treble damages remedy that is a fixture of U.S. antitrust law has generally not been adopted by foreign nations. Indeed, U.S. antitrust judgments awarding treble damages against foreign citizens are a particular source of resentment, and some foreign nations have enacted "blocking" and "clawback" statutes designed to discourage enforcement of U.S. treble damages judgments. See generally ABA SECTION OF ANTITRUST LAW, ANTITRUST L. DEV. 1208-09 (5th ed. 2002) (noting foreign countries' concern over "the willingness of U.S. courts to enforce antitrust laws extraterritorially" and enactment of foreign blocking statutes); RESTATEMENT (THIRD) § 403(2)(g) (describing unreasonableness of regulating activity primarily of interest to foreign sovereign); Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 251 (2001) (noting foreign sentiment that treble damages liability is "one of the most unacceptable aspects of U.S. regulatory law").[3]

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[3] See also Foreign Extraterritorial Measures Act, R.S.C., ch. F-29, § 8(1) (1985) (Can.) (authorizing Attorney General to declare that certain antitrust judgments of foreign tribunals "not be recognized or enforceable") (*modified by* U.S.-Canada Agreement); Protection of Trading Interests Act, 1980, c. 11, § 6 (Eng.) (permitting defendants subject to multiple damages awards to "recover from the party in whose favour the judgment was given so much of the amount * * * as exceeds the part attributable to compensation"); Foreign Proceedings (Excess of Jurisdiction) Act, 1984, pt. II div. 3, § 10(1) (Austl.) (*as amended*) (permitting Australian defendant in foreign antitrust proceeding to recoup

Sales of goods in foreign countries that do not themselves affect U.S. commerce have no special importance to the United States, and the United States has no interest in regulating such transactions. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (rejecting "parochial concept that all disputes must be resolved under our laws and in our courts"); RESTATEMENT (THIRD) § 403(2)(c); see also RESTATEMENT (THIRD) § 403(2)(a), (b) (regulation of foreign activities may be justified by nation's relationship either to location of, or to person principally responsible for, injury). Considerations of deterrence—the only U.S. interest identified by respondents or the court below—provide no basis for subjecting purely foreign transactions to federal law. See, *infra*, pp. 37-39. Rather, *foreign* laws regulate anticompetitive conduct in foreign countries. "Nearly 100 jurisdictions now have comprehensive antitrust laws," and "[n]early all" of these "now ban cartels either civilly or criminally." R. Hewitt Pate, *The DOJ International Antitrust Program—Maintaining the Momentum*, Speech Before the ABA Section of Antitrust Law, at 6, 8 (Feb. 6, 2003), available at http://www.usdoj.gov/atr/public/speeches/200736.pdf. Respondents have, indeed, asserted claims under the "competition laws of the relevant foreign nations" in addition to U.S. law (Am. Comp. ¶ 114 (J.A. 63)).[4]

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the entire "amount recovered pursuant to the foreign judgment" where certain conditions are met).

[4] See Trade Practices Act, 1974, cc. 4, 6, § 45(2)(a)(ii) (Austl.) (prohibiting anticompetitive conduct and providing for regulatory and private civil damages actions); Organic Law of Consumer Protection, arts. 51, 70, 87 R.O. No. 21 (2000) (Ecuador) (same); Panama Const. art. 290 & Law 29 of 1996, arts. 5, 11, 27 (Panama) (same); Law of Ukraine on the Protection of Economic Competition, arts. 6, 36, 50, 52, 55 (Jan. 11, 2001) (same); see also United Nations Conference on Trade and Development, *Competition Links: National Competition Authorities* (2000), at http://r0.unctad.org/en/subsites/cpolicy/english/nat-compaut.htm (last visited Jan. 30, 2004) (collecting foreign competition law for United Nations Conference on Trade and Development).

In keeping with these considerations, this Court has construed the Sherman Act to apply extraterritorially to address the *U.S. effects* of anticompetitive conduct, not its purely foreign effects. See, *supra*, pp. 11-13. The FTAIA contains no "clear expression" warranting a departure from these precedents, much less a construction that would override basic presumptions against applying U.S. law unreasonably to foreign activity.[5]

b. ***Avoidance of unintended adverse consequences.*** This Court also has required sensible constructions of federal legislation that avoid unworkable or impractical results not unambiguously required by the statute itself. See, *e.g.*, *Pegram v. Herdrich*, 530 U.S. 211, 237 (2000) (rejecting construction of ERISA that would multiply federal claims and pose "a risk to the efficiency of federal courts"); *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 232 (1995) (rejecting construction of Airline Deregulation Act that would have unduly burdened federal courts). Significant adverse practical

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[5] As the Court recognized in *Hartford Fire*, in the case of the Sherman Act the concepts of subject matter jurisdiction and prescriptive jurisdiction may be coterminous. 509 U.S. at 796 n.22. Thus, while the FTAIA has been viewed as a constraint on the subject matter jurisdiction of federal courts (see *United Phosphorus Ltd. v. ANGUS Chem. Co.*, 322 F.3d 942, 950-51 (7th Cir. 2003), *petition for cert. denied* 72 U.S.L.W. 3327 (Nov. 10, 2003) (No. 03-203); see also, *e.g.*, H.R. Rep. No. 97-686 at 9 (statutory test applies at "jurisdictional stage"); *id.* at 13 (FTAIA governs "the subject matter jurisdiction of United States antitrust law")), the same outcome would obtain here if the FTAIA were instead viewed as a limitation on the prescriptive scope of the antitrust laws. As Justice Scalia explained for four dissenting Justices in *Hartford Fire*, lack of prescriptive jurisdiction requires "dismissal" for "failure to state a claim." 509 U.S. at 822. In this case, petitioners moved in the district court for dismissal both for lack of subject matter jurisdiction and for failure to state a claim. Pet. App. 45a.

consequences would flow from the D.C. Circuit's vast expansion of the extraterritorial scope of U.S. antitrust law.

The interpretation adopted by the court of appeals would flood the federal courts with foreign claims by all persons who can allege injury from conduct that also injured "someone" in U.S. commerce. With the globalization of economic activity, foreign harms can almost always be linked to some domestic harm. There is every reason to expect that foreign claimants will attempt to assert claims under U.S. law in federal court to obtain the treble damages, liberal discovery rules, jury trials and class action procedures not available in many of their own jurisdictions. See *Smith Kline & French Labs Ltd. v. Bloch*, 1 W.L.R. 730 (C.A. 1982) (Lord Denning) ("As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune"). As the Solicitor General has noted, foreign plaintiffs are bringing antitrust claims to recover for injuries arising from purely foreign transactions with "increasing frequency." Pet. App. 73a. The decision by the court of appeals, if allowed to stand, would bring about a "sea change in the number and type of private actions permitted under the Sherman Act." *Id.* at 79a.

Congress cannot plausibly have intended to dedicate substantial federal resources to resolving purely foreign disputes that would otherwise have no place in U.S. courts. Nothing in the FTAIA's language or history suggests that Congress intended to make the federal district courts "world courts" for resolution of antitrust controversies. Absent such a clear direction, the "precious resources of United States courts" (*Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975)) are presumptively reserved for redressing injuries in this country. See, *e.g.*, *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987) (Bork, J.) (claims that foreign defendants defrauded foreign investors fell outside the subject matter jurisdiction of federal securities laws designed to

protect "American investors and markets"; it is "far from clear that [judicial] resources would be well spent" on such disputes).

In addition, litigating the novel claims authorized by the court of appeals would give rise to practical difficulties that make it inconceivable that Congress ever intended to permit such claims. This Court has rejected proposed interpretations of the antitrust laws that would require impractical or unduly burdensome litigation in the district courts. In *Hanover Shoe, Inc. v. United Shoe Machine Corp.*, 392 U.S. 481, 491-93 (1968), for example, it refused to permit a "pass on" defense that would turn antitrust trials into "long and complicated proceedings involving massive evidence and complicated theories." See also *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 731-32 (1977); *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 541-45 (1983) (stating that expansive antitrust standing would lead to "massive and complex damages litigation" that "not only burdens the courts, but also undermines the effectiveness of treble-damages suits"); see generally *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 274 (1992) (stating that "RICO's remedial purposes would more probably be hobbled than helped" by expansive construction of RICO private right of action).

The court of appeals' ruling that a litigant asserting a claim based on injury in foreign commerce must first show, as a prerequisite to asserting its own claim, "a claim" on the part of someone else arising from effects on U.S. commerce (Pet. App. 23a) presents an array of complex practical questions for which the statute supplies no answers. How would a foreign plaintiff establish that some other person has "a claim"—not just in price-fixing cases but in *any* case brought under the Sherman Act? Such a hypothetical "claim," of course, must actually have merit; Congress cannot have intended the FTAIA to require only an empty exercise in

pleading. Nor is it plausible that Congress wanted a preliminary merits inquiry on a non-party claim to decide whether the claim of the plaintiff may proceed. See generally *DSMC Inc. v. Convera Corp.*, 349 F.3d 679, 683 (D.C. Cir. 2003) ("[J]urisdictional rules should be, to the extent possible, clear, predictable, bright-line rules that can be applied to determine jurisdiction with a fair degree of certainty from the outset").

Under the court of appeals' ruling, a plaintiff also would need to prove that the *same* "conduct" that caused its foreign injury also caused the domestic injury (as respondents seek to do here by alleging a "global conspiracy"). This would require courts to answer the complex (indeed, metaphysical) question whether certain actions that affect the United States and other actions that affect foreign markets should be considered the "same conduct," and in particular whether agreements directed at different countries constitute multiple narrow conspiracies or one broad conspiracy. See generally *United States v. Nevils*, 897 F.2d 300, 306 (8th Cir. 1990) (noting "difficult task of distinguishing between single and multiple conspiracies"). This fact-intensive inquiry would require extensive proceedings on threshold issues. Further, where the challenged restraint is not a "per se" violation, such as price fixing, determining whether an antitrust "claim" exists would typically require a complex "rule of reason" analysis, including an assessment of the relevant U.S. market, *before* assessing the foreign market in which the plaintiff was injured. It defies belief that Congress intended to engender threshold proceedings of this nature merely by using the word "a" in subsection (2).

c. ***Avoidance of constitutional problems.*** Yet another reason to reject the court of appeals' construction of the FTAIA is that it would raise serious constitutional questions. Statutes should be construed to avoid such constitutional

difficulties whenever possible. *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 173-74 (2001).[6]

As the Fifth Circuit noted in *HeereMac*, 241 F.3d at 426 n.18, application of U.S. antitrust law to purely foreign transactions that do not affect U.S. commerce might well fall outside Congress's power to regulate commerce "*with* foreign Nations, and among the several States." U.S. Const. art. I, § 8[3] (emphasis added). The Constitution's grant of legislative authority does not include power to regulate commerce *within* or *among* foreign nations. Yet such purely foreign commerce is the *only* commerce implicated by respondents' vitamin purchases.

The decision below effectively construed the FTAIA to confer on purely foreign purchasers a claim against purely foreign sellers for transactions consummated entirely within or between foreign countries, even where (as here) those transactions had no effect on U.S. commerce. The court of appeals would have U.S. law dictate petitioners' liability for the effects of their alleged misconduct not only on persons participating in U.S. commerce but also on all others worldwide. Congress's Commerce Clause authority for such an extraordinary legislative prescription is doubtful. Even if the FTAIA's textual meaning were less than plain, the court of appeals should have construed the FTAIA to avoid this question of the constitutional limits on Congress's power.

Application of U.S. law to purely foreign transactions also would raise serious constitutional concerns under the Due Process Clause. The same factors that determine whether

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[6] The D.C. Circuit addressed this question by stating that petitioners had conceded that the vitamin cartel produced substantial effects in the United States, which Congress may regulate. Pet. App. 9a. But acknowledging that Congress may regulate the U.S. effects of conspiratorial conduct does not answer the question whether it can regulate the purely foreign effects of that conduct.

application of the law of a given state to a particular person or activity comports with due process—contacts with the state, the state's interests arising from those contacts and the fairness of applying the state's law in the context of a particular case—should apply to extraterritorial assertions of federal law. See Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1223, 1240-42 (1992) (arguing that Fifth Amendment's Due Process Clause "limits extraterritorial application of substantive federal law") (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 819-22 (1985); *Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930)); see also 1A AREEDA ET AL., ANTITRUST LAW ¶ 273c4 n.25 (2003 Supp.) (FTAIA should not be interpreted "in such a way as to impute to Congress a wish to apply United States law to a transaction whose relation to the United States is so minimal"). Respondents' vitamin purchases in Australia, Ecuador, Panama and Ukraine were purely foreign transactions that lacked any connection to the United States, much less "significant contacts."

These daunting constitutional problems should be avoided by rejecting the construction of the FTAIA adopted by the D.C. Circuit.

3. *The historical context and legislative history confirm the restrictive purpose of the FTAIA.*

The historical context of the FTAIA also refutes the expansive interpretation adopted by the court of appeals. As the Solicitor General noted below, the FTAIA "was prompted in significant part by a perceived need to clarify the *limitations* of the Sherman Act's reach over international transactions." Pet. App. 76a (emphasis added). See also *Hartford Fire*, 509 U.S. at 796 n.23 ("The FTAIA was intended to exempt from the Sherman Act export transactions

that did not injure the *United States economy*") (emphasis added). This historical context reinforces the limiting purpose evident in the FTAIA's text. See *Pierce County v. Guillen*, 537 U.S. 129, 146 (2003) (plain meaning of statute was "reinforced by [its] history").

As of the FTAIA's enactment, no court had ever held that injuries resulting from the effects of anticompetitive conduct on purely foreign commerce were actionable under U.S. antitrust law. See, *supra*, pp. 13-14. The House Judiciary Committee Report accompanying the FTAIA noted, however, that certain recent court decisions reflected "ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction." H.R. Rep. No. 97-686, at 5. The Report cited three district court decisions that, using "different formulations of the nature and quantum of 'effects' needed," had permitted foreign plaintiffs to assert claims for injuries sustained abroad as a result of restrictions on exports of goods or services from the United States. *Id.*[7]

Those decisions seemingly departed from the longstanding view of leading treatises and commentators that "the Sherman

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[7] See *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, 383 F. Supp. 586, 587 (E.D. Pa. 1974) (suit by Bahamian beer distributor against U.S. beer supplier alleging injuries from restraints on U.S. wholesalers which "directly affected the flow of commerce out of this country" to the Bahamas); *Waldbaum v. Worldvision Enters., Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,378 (S.D.N.Y. Nov. 22, 1978) (foreign purchaser of U.S. film licenses for South African market alleged that defendant's tying practices restrained competition in U.S. export market, which injured plaintiff as purchaser in that market); *Industria Siciliani Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng'g Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,256 (S.D.N.Y. Jan. 18, 1977) (foreign purchaser of U.S. design and engineering services alleged injury as result of "defendants' actions in minimizing domestic [*i.e.*, U.S.] competition in the sale of certain engineering services" with result that "trade in the export of [such] services was restrained").

Act itself has no business" reaching transactions with "solely foreign effects." KINGMAN BREWSTER, JR., ANTITRUST AND AMERICAN BUSINESS ABROAD 352 (1958). See also, *e.g.*, Donald I. Baker, *Antitrust and World Trade: Tempest in an International Teapot*, 8 CORNELL INT'L L.J. 16, 41 (1974) (former Assistant Attorney General in charge of Antitrust Division from 1976 to 1977 stating that "we should expect that other nations and communities will use *their* antitrust laws to protect *their* consumers against those who restrain competition in *their* markets") (emphasis in original); THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 79 (1955) ("The Sherman Act is not, of course, intended to protect foreign consumers against monopoly in their home markets"). An opposing minority view held that foreign plaintiffs should be entitled to sue for injuries sustained abroad as a result of restraints affecting U.S. exports, because U.S. exports are a component (along with U.S. imports) of the "commerce with foreign nations" regulated by the Sherman Act. See, *e.g.*, James Rahl, *American Antitrust and Foreign Operations: What is Covered?*, 8 CORNELL INT'L L.J. 1, 6-7 (1974). Even advocates of this position did not contend, however, that foreign plaintiffs could recover for injuries sustained in purely foreign transactions that themselves had no substantial effect on U.S. commerce. See *id.* at 6.

Congress enacted the FTAIA against this backdrop to enhance U.S. export competitiveness by easing concerns of U.S. businesses about U.S. antitrust scrutiny of "their conduct which primarily affects foreign, rather than domestic markets." Foreign Trade Antitrust Improvements Act: Hearing on S. 795 Before the Comm. on the Judiciary, 97th Cong. 1 (1981) ("S. Hearings on S.795") (statement of Chairman Thurmond). Congress sought to ensure a level playing field so that U.S. firms could engage in U.S. exports and purely foreign activity without concerns about federal

antitrust law, subject only to restrictions imposed by foreign nations. H.R. Rep. No. 97-686 at 2-4, 7-8.

Congress intended the FTAIA's jurisdictional test to be a "straightforward clarification of existing American law." *Id.* at 2. The House Report noted that, since *Alcoa*, "it is the situs of the effects as opposed to the conduct, that determines whether United States antitrust law applies." *Id.* at 5. As explained by the Chairman of the Senate Judiciary Committee, Congress intended to require a "threshold" jurisdictional determination that the alleged violation had "the requisite direct and substantial effect on commerce in this country." S. Hearings on S.795 at 1, 2 (statement of Chairman Thurmond).

Congress's focus was not limited to U.S. export commerce. "[W]holly foreign transactions as well as export transactions," it explained, "are covered by the amendment," thereby excluding from antitrust scrutiny "transactions within, between, or among other nations" that do not have "a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor." H.R. Rep. 97-686 at 9-10. See also *id.* ("H.R. 5235 achieves an important objective of freeing American-owned firms that operate entirely abroad or in United States export trade from the possibility of dual and conflicting antitrust regulation").

Significantly, the legislative history repeatedly identifies the location of individual "transactions" as the controlling consideration for jurisdiction, not the nationality of the victim or the alleged violator. Congress stated that "purely foreign transactions" would be excluded from U.S. antitrust jurisdiction if those *transactions* did not have a direct, substantial and foreseeable effect on U.S. commerce. *Id.* 9-10 ("[A] transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws"). Nowhere did Congress endorse suits complaining of

"global conspiracies" on behalf of persons injured in foreign transactions that do not themselves affect U.S. commerce.

Congress's exclusion of foreign transactions from the reach of the Sherman Act was grounded on respect for the sovereignty of foreign nations. As the Chairman of the House Judiciary Committee noted, the legislation sought to mollify "our closest allies and trading partners [who] resent the extraterritorial reach of our antitrust laws." *Foreign Trade Antitrust Improvements Act: Hearing on H.R. 2826 Before the House Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary*, 97th Cong. 1 (1981) (statement of Chairman Rodino). The "domestic effects standard" was intended to "limit the reach of our antitrust laws in a manner consistent with our major trading partners." *Id.* at 2. See also *id.* at 92 (statement of James R. Atwood) ("By making clear that effects in foreign markets are the domain of foreign rather than American law, H.R. 2326 would put American practice in a more rational and diplomatically defensible mode. No other country attempts to regulate effects in foreign markets through the enforcement of its own antitrust law").

Although the court of appeals claimed that the legislative record supports its expansive interpretation, Judge Henderson and the Fifth Circuit correctly concluded that the opposite is true. Pet. App. 40a; *HeereMac*, 241 F.3d at 428-29. As the Solicitor General has noted, "there is no indication that Congress had in mind the scenario occurring here—foreign plaintiffs suing to recover for alleged overcharges paid in foreign transactions for foreign goods." Pet. App. 76a. To the contrary, the House Report explains that subsection (2) of the statute was added "to require that the 'effect' providing the jurisdictional nexus"—*i.e.*, the "direct, substantial, and reasonably foreseeable" effect on U.S. commerce required by subsection (1)—"must also be *the basis for the injury alleged*." H.R. Rep. No. 97-686, at 11-12 (emphasis added). Congress's emphasis on the "nexus" between a U.S. commercial effect and "the injury alleged" demonstrates Congress's purpose to restrict Sherman Act litigation to claims complaining of injury sustained in U.S. commerce. Indeed, the House Report repeatedly refers to antitrust protections enjoyed by foreign purchasers "*in the domestic marketplace*." *Id.* at 10 (emphasis added).

The D.C. Circuit focused on a statement in the House Report that "the impact of the illegal conduct" need not "be experienced by the injured party *within* the United States." Pet. App. 24a-25a (emphasis added). That statement merely reiterates established law that injuries sustained abroad may be recoverable under U.S. antitrust law if the plaintiff was harmed while doing business in U.S. commerce. See, *e.g.*, *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 816-17 (D.C. Cir. 1968) (injuries sustained by American companies as result of exclusion from federally financed ocean shipping between foreign countries were actionable, although sustained overseas, because such shipping constituted U.S. commerce). It does not authorize an antitrust claim where the party's injury does not arise from an effect on *U.S. commerce*.

Following enactment of the FTAIA, scholars and enforcement officials understood the amendment to preclude recovery for foreign injury. James Atwood, a leading expert whose views were cited repeatedly in the House Report on the FTAIA, noted: "In the 1982 statute, Congress tried to convey the following basic message (one to which the Justice Department has already subscribed): *The U.S. antitrust laws exist for the protection of American and not foreign interests*." James R. Atwood, *Conflicts of Jurisdiction in the Antitrust Field: The Example of Export Cartels*, 50 LAW & CONTEMP. PROB. 153, 155 (1987) (emphasis added). See also David Gill, *Review of Antitrust and American Business Abroad*, 77 AM. J. INT'L L. 679, 681 (1983) ("Atwood's suggestion that foreign consumers need not be protected by

the U.S. antitrust laws has been largely enacted into law"); accord John H. Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws*, 52 FORD. CORP. L. INST. 350, 364 (1983) (former head of the Antitrust Division stating that "[t]he debate among antitrust commentators concerning subject matter jurisdiction over conduct affecting wholly foreign commerce is resolved in favor of denying jurisdiction"); Wilbur L. Fugate, *The Export Trade Exception to the Antitrust Laws: The Old Webb-Pomerene Act and the New Export Trading Company Act*, 15 VAND. J. TRANSNAT'L L. 673, 705 (1982) (FTAIA "makes clear that trade between third countries is not covered by the Sherman Act").

Treatises repeatedly cite the FTAIA to show that U.S. antitrust law does not protect international competition for its own sake and denies recovery for foreign injury. See MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 52 (2d ed. 2001) ("Antitrust injury suffered in foreign markets is excluded from the scope of the Sherman and Federal Trade Commission Acts unless it involves injury to a U.S. exporter"); 1 Barry E. Hawk, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 555 (Supp. 1993) (the FTAIA "expressly precludes recovery for injuries suffered in foreign markets," a limitation that "applies to all plaintiffs—foreign governments, foreign private firms and U.S. firms doing business abroad"); *id.* at 182.3 (Supp. 1996-1) (FTAIA limits jurisdiction and standing "to exclude claims for [injuries] incurred only in foreign markets").

This historical record, like the text of the statute itself, demonstrates that the fundamental objective of the FTAIA was to restrict, not enlarge, the extraterritorial application of U.S. antitrust law. The D.C. Circuit's reading of the statute is directly contrary to that purpose.

C. The Deterrence Rationale Invoked by the Court of Appeals Cannot Justify its Ruling.

The court of appeals based its sweeping interpretation of the FTAIA on its own policy judgment that its construction was "necessary to protect U.S. commerce from global conspiracies." Pet. App. 32a. In the court's view, without the threat of liability to all their victims, wherever located, antitrust violators would not be adequately deterred from conduct that harms the United States. *Id.* That judgment is unsupported by any law or precedent of this Court and has been criticized by the very federal agencies responsible for antitrust enforcement.

The court of appeals claimed that its expansive reading of the FTAIA was supported by "policies of deterrence" that it viewed as "emanating" from this Court's decision in *Pfizer*. Pet. App. 4a, 30a-33a. But nothing in *Pfizer* supports the D.C. Circuit's virtually limitless view of U.S. antitrust jurisdiction. *Pfizer* simply held that a foreign state is a "person" entitled to sue under the Clayton Act. 434 U.S. at 320. While the Court noted that its ruling would advance deterrence, it never suggested that U.S. antitrust law provides a remedy for injuries sustained outside U.S. commerce or that deterrence considerations would justify extending the private remedy conferred by the Clayton Act to injuries sustained in purely foreign transactions. To the contrary, the Court expressly stated that U.S. antitrust law should protect a foreign government that "enters *our commercial markets*" (*id.* at 318) (emphasis added)—not purchasers of goods in foreign nations. See Edward D. Cavanagh, *The FTAIA and Subject Matter Jurisdiction Over Foreign Transactions Under the Antitrust Laws*, 56 SMU L. REV. 2151, 2185-86 (2003) ("*Foreign Transactions*") ("*Pfizer* provides no support for the expansion of subject matter jurisdiction under the FTAIA").

Nor did the court of appeals consider existing deterrents. Congress has steadily increased the criminal penalties that

may be imposed on corporations for violations of the Sherman Act from $50,000 (prior to 1974) to $10,000,000 today. Actual penalties substantially exceed these amounts as a result of other provisions of the criminal code that authorize fines based on twice the corporation's pecuniary gain from price fixing or twice the victim's loss. See 18 U.S.C. § 3571. This provision has resulted in payment of a $500 million federal criminal penalty by one of the petitioners in this case, which remains the largest criminal fine ever obtained by the Department of Justice. Pet. App. 68a. These criminal fine provisions, together with the Clayton Act's authorization of treble damages and attorneys' fees, result in an aggregate exposure for antitrust violators under federal law alone of more than five times the economic harms resulting from the U.S. effects of their misconduct. The court of appeals did not mention the deterrent effect of these criminal sanctions (or the fines and prison terms imposed on individuals personally, see, *supra*, p. 4) in reaching its decision.

The court of appeals also failed to consider the additional deterrent effects not only of civil damages claims under state laws that permit suits by state attorneys general and indirect purchasers but also of civil claims under foreign laws and foreign governmental enforcement proceedings. Petitioners have collectively paid more than $1 billion in fines to foreign antitrust enforcers for alleged cartel activity in the vitamins industry. Pet. App. 68a. See also, *supra*, pp. 23-24 & n.3 (discussing foreign prohibitions on anticompetitive conduct).

Finally, the federal agencies charged with enforcing the antitrust laws have warned that the decision below will weaken, rather than enhance, deterrence. As the Solicitor General explained below, imposing treble damages liability for worldwide sales will discourage antitrust violators from disclosing criminal conduct under programs in the United States and other jurisdictions that provide amnesty from criminal prosecution. Pet. App. 78a-79a. According to the

government, these amnesty programs are "the number one source of leads for breaking up international cartels." *Id.* at 78a. They also play a substantial role in deterring violations because, by making cooperation attractive, they increase the probability that illegal practices will eventually be detected. *Id.* at 79a. The significant increase in liability that would result from permitting U.S. treble damages claims for all harms sustained worldwide—liability that would be invited by disclosing criminal wrongdoing—would undoubtedly dissuade many potential cooperators from coming forward. The court of appeals' policy judgment as to how best to deter antitrust violations is refuted by the expert assessment of the U.S. antitrust enforcement agencies. See *id.* at 78a-79a; see also Cavanagh, *Foreign Transactions*, at 2185 (court's ruling would "mak[e] it more difficult for the Antitrust Division to prosecute violations and more difficult for private plaintiffs to sue"). The court of appeals should not have promoted global compensation at the expense of government investigation and enforcement.

D. Respondents' "Global Conspiracy" Allegations Do Not Bring Their Claims Within the Scope of the Sherman Act.

Respondents cannot save their claims by arguing that their injuries "arise from" an effect on U.S. commerce, purportedly because they were caused by a "global conspiracy" that affected commerce both in the United States and in foreign countries. This Court's precedents, as well as the text of the FTAIA, foreclose that effort to fabricate a U.S. injury out of a purely foreign one.

This Court has previously rejected attempts by plaintiffs seeking to link anticompetitive acts in the U.S. and in foreign markets by alleging "one big conspiracy." In *Matsushita*, U.S. television manufacturers alleged that price-fixing activity in a foreign market was part of a larger, international conspiracy that included predatory pricing in the United States. 475 U.S.

at 584 n.7. This Court refused to accept allegations of "one large conspiracy" as a pretext for considering foreign market effects that did not cause injuries in U.S. commerce. *Id.*

Relying on *Matsushita*, the Fifth Circuit in *HeereMac* rejected precisely the same global conspiracy argument made by respondents here. There the plaintiff, a foreign oil company, sought to recover payments for barge services in foreign waters by alleging that its injuries resulted from a "worldwide" conspiracy to control a "single, unified, global market" for barge services. 241 F.3d at 425. The Fifth Circuit rejected the plaintiff's claim that its injuries "arose from" the effect of the conspiracy on the market for barge services in the United States. It was not enough, the court held, to show "a connection and an interrelatedness" between the high prices plaintiff paid and high prices paid by others for the same services in the United States. *HeereMac*, 241 F.3d at 427. As the Solicitor General noted below, "[t]he FTAIA's focus is on domestic *effects* of anticompetitive conduct," and not just on that conduct itself. Pet. App. 75a (emphasis added).

Respondents' claims arise only from effects felt in foreign commerce. Respondents cannot conflate those foreign effects with other U.S. effects giving rise to claims by different persons. Congress sought to apply U.S. law to particular *transactions* having the requisite U.S. effects and to exclude "wholly foreign transactions" from the scope of federal antitrust jurisdiction. See, *supra*, pp. 33-34; *Hartford Fire*, 509 U.S. at 796 n.23 (FTAIA exempts "export transactions that did not injure the United States economy"); *HeereMac*, 241 F.3d at 426 ("[T]he relevant House Report shows that Congress intended to exclude purely foreign transactions, like the contract for services in the North Sea between Statoil and the foreign defendants").

Respondents also argued in their opposition to the petition for certiorari that vitamin prices in the United States served as

a "benchmark" for prices worldwide. Br. in Opp. 2-3. This variant of their "global conspiracy" allegation does not appear in their complaint (see J.A. 6) and, in any event, has no legal significance. The FTAIA limits U.S. antitrust jurisdiction to claims arising from the "direct, substantial, and reasonably foreseeable" U.S. effects of anticompetitive conduct. No such effect gave rise to respondents' claims; they were not injured by overcharges paid by others in U.S. commerce. Their claims arise from injuries they themselves sustained by paying overcharges in Australia, Ukraine, Ecuador and Panama. The prices of vitamins in foreign countries would at best be indirect and remote results of the fixing of prices in the United States. That connection is insufficient to bring respondents' claims within the scope of U.S. antitrust law. See generally *Associated General*, 459 U.S. at 531-32.

Respondents' assertions of a "global conspiracy" and "benchmark pricing" are unavailing because they do not alter the fact that respondents' injuries arise from a foreign, not a U.S., effect. If a foreign plaintiff who was injured in a purely foreign transaction could assert a claim under the Sherman Act simply by alleging a "global conspiracy" or a relationship between U.S. and foreign prices, the federal courts would become "world courts" swamped with imported claims lacking any "cognizable U.S. interests." Makan Delrahim, *Department of Justice Perspectives on International Antitrust Enforcement*, Speech Before the ABA Section of Antitrust Law (Nov. 18, 2003), at 11, available at http://www.usdoj.gov/atr/public/speeches/201509.htm. With no direct statutory language so providing, Congress cannot reasonably be thought to have intended that result. To the contrary, it wanted U.S. antitrust sanctions to be used for the protection of "the domestic marketplace," not foreign economies. H.R. Rep. No. 97-686 at 10.

II. THE PRIVATE DAMAGES REMEDY CONFERRED BY SECTION 4 OF THE CLAYTON ACT DOES NOT PERMIT RECOVERY FOR INJURIES SUSTAINED IN PURELY FOREIGN TRANSACTIONS.

Even if this Court were to conclude that the jurisdictional bar of the FTAIA is inapplicable in this case, respondents nevertheless lack standing to bring a claim under the Clayton Act. The Clayton Act does not confer an abstract right to pursue conspiracies. While the government has broad Sherman Act authority to "prevent and restrain" antitrust violations (15 U.S.C. § 4), a private party may sue under the Clayton Act only to redress its own injury. Standing in private damages actions is strictly limited based on principles similar to those applied in common law tort actions (*Associated General*, 459 U.S. at 532-36), and each plaintiff must show causation and cognizable antitrust injury to itself. See *id.* at 532-33; 2 AREEDA ET AL., ANTITRUST LAW ¶ 353. The FTAIA did not amend the Clayton Act; indeed, Congress made clear that it did "not intend to alter existing concepts of antitrust injury or antitrust standing." H.R. Rep. No. 97-686, at 11.

Section 4 of the Clayton Act provides that "[a]ny person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws may sue therefor * * *." 15 U.S.C. § 15. Respondents have alleged a violation of Section 1 of the Sherman Act, which prohibits agreements "in restraint of trade or commerce among the several States, or with foreign nations." § 1. Respondents' own injuries were not caused "by reason of" an agreement in restraint of commerce "among" the several states or "with" foreign nations, because their injuries are not a direct consequence of any impairment of competition in U.S. commerce. Foreign effects that do not result from diminished U.S. competition are not actionable under the

Clayton Act. See *Matsushita*, 475 U.S. at 584 n.7 (private plaintiffs challenging multinational conspiracy can seek redress only for injuries that occur "in the American market"); see also 15 U.S.C. § 26 (right to injunctive relief requires "threatened loss or damage *by* a violation of the antitrust laws") (emphasis added).

This interpretation of Section 4 is also compelled by the rule, discussed above (see, *supra*, pp. 21-25), that federal statutes should be construed so as to avoid unreasonable application of U.S. law to foreign activity. Interpreting the Clayton Act to permit respondents to recover for injuries sustained in purely foreign transactions would unreasonably interfere with foreign nations' interests in having their own policies regarding private plaintiff suits apply to transactions within their own economies.

Standing principles developed in the antitrust context confirm this result. The Court has explained that Section 4 requires a plaintiff to show "antitrust injury" in order to "ensure[] that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990). Congress did not intend "to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Associated General*, 459 U.S. at 534. Accordingly, to be actionable, a plaintiff's injury must be "an injury of the type the antitrust laws were designed to prevent." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 (1986). The antitrust laws were designed to prevent injuries to American markets and American consumers, as well as to foreign persons that "enter[] our commercial markets." *Pfizer*, 434 U.S. at 318; *supra*, p. 37. They were *not* designed to prevent injuries sustained in foreign transactions affected by breakdowns in competition outside U.S. commerce. Similarly, in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977),

this Court stated that, to be actionable under the Clayton Act, a plaintiff's injury must "flow from that which makes defendants' acts unlawful." A contrary result, the Court explained, would "divorce[] antitrust recovery from the purposes of the antitrust laws." *Id.* at 487. Because an effect on U.S. commerce is necessary for foreign conduct to be unlawful under the Sherman Act (see, *supra*, pp. 11-14), it follows, under *Brunswick*, that only injuries that "flow from" those U.S. effects are actionable.

The antitrust standing inquiry also considers the practical effects of permitting the plaintiff to assert an antitrust claim. See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. ___, No. 02-682, 72 U.S.L.W. 4114, slip op. at 2 (Jan. 13, 2004) ("Denying a remedy * * * will serve the strong interest 'in keeping the scope of complex antitrust trials within judicially manageable limits'" (quoting *Associated General*, 459 U.S. at 543)) (Stevens, J., concurring in judgment). Allowing respondents' claims—and those of innumerable similarly situated foreign plaintiffs that would inexorably follow—will adversely affect the administration of justice in heavily burdened federal courts. See, *supra*, pp. 25-27; see generally *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 266, 274 (1992) (noting "unlikelihood" that Congress intended RICO private action modeled on Section 4 of the Clayton Act to provide a remedy for all injuries and expressing concern that contrary result would impair statute's remedial purpose); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 747-48 (1975) ("[T]he inexorable broadening of the class of plaintiffs who may sue in this area of the law will ultimately result in more harm than good").

This Court relied on antitrust standing principles in *Matsushita* to reject arguments by U.S. television manufacturers that Japanese competitors had engaged in price-fixing conduct in the Japanese market as part of "one large

conspiracy" that included attempts to monopolize the U.S. market. 475 U.S. at 584 n.7. The alleged harms to Japanese commerce, the Court stated, could not cause "an injury for which the antitrust laws provide relief." *Id.* See also *Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293, 307 (3d Cir. 2002) (holding that injuries occurring "exclusively in foreign markets * * * are not of the type Congress intended to prevent through the [FTAIA] or the Sherman Act"); 2 SPENCER W. WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD ¶ 13.22 (3d ed. 2002) ("[P]laintiffs who are complaining of restraints they feel in foreign markets" do "not have the right to invoke American antitrust remedies"). Those principles are controlling here and require dismissal of a complaint that does not "fall within 'the zone of interests to be protected or regulated by the statute.'" *Valley Forge*, 454 U.S. at 475. See also 1A AREEDA ET AL., ¶ 272h ("[T]he concern of the antitrust laws is protection of *American* consumers and *American* exporters, not foreign consumers or producers") (emphasis in original).

These conclusions, which independently require the dismissal of respondents' claims, also reinforce the correct interpretation of the FTAIA. As the Solicitor General has noted, the FTAIA "incorporate[s]" concepts of antitrust injury and standing (Pet. App. 75a) by requiring that only injuries that result from an anticompetitive effect on U.S. commerce can support a claim. Subsection (1) of the FTAIA makes indisputably clear that "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce is necessary for foreign conduct to be unlawful, and subsection (2), by expressly requiring that a claim must "arise from" a U.S. effect, incorporates *Brunswick*'s requirement that a plaintiff's injury "flow from" that which makes the defendant's conduct unlawful—*i.e.*, its effect on U.S. commerce.

To reject that conclusion, as the court below did, is to read the FTAIA as an affirmative grant of standing to persons injured in foreign commerce even though their injuries do not

flow from any U.S. effect. It turns the FTAIA into a silent partial repeal of basic standing principles—for the benefit of foreign plaintiffs. Subsection (2) cannot reasonably be interpreted as having effected so dramatic a departure from existing law, which Congress specifically disclaimed any intent to change.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2004

APPENDIX

1. Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

2. The Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, Title IV, 96 Stat. 1233, 1246 (1982), codified at 15 U.S.C. § 6a, provides:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

3. Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.